

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Arnold K. Smith,

Petitioner,

vs.

City of Champlin,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:30 a.m. on August 6, 1997, at the Office of Administrative Hearings, 100 Washington Square -- Suite 1700, Minneapolis, Minnesota.

Patrick J. Kelly, Attorney at Law, 1750 North Central Life Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Petitioner, Arnold K. Smith (hereinafter "Mr. Smith"). Carla J. Heyl, Attorney at Law, 145 University Avenue West, Minneapolis, Minnesota 55103-2044, appeared on behalf of the City of Champlin (hereinafter the "City"). The record of the proceeding closed on August 22, 1997, upon receipt of the parties' post-hearing briefs.

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (1996), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

1. Whether the City denied rights afforded to Mr. Smith under the Veterans Preference Act by failing to notify him of his right to request a hearing before demoting him from the position of parks foreman/supervisor to the position of lead man on or about January 27, 1992; and

2. Whether the City denied rights afforded to Mr. Smith under the Veterans Preference Act by failing to notify him of his right to request a hearing before demoting him from the position of lead man to the position of light equipment operator on or about January 1, 1995.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Smith served on active duty in the United States Air Force from September 18, 1963, until September 15, 1967, after which he was honorably discharged. In 1978 Mr. Smith became employed by the City as a maintenance laborer at an hourly rate. He was subsequently promoted to heavy equipment operator in 1981. (Testimony of Arnold Smith)

2. In 1988 the City promoted Mr. Smith to a permanent lead man position. His duties in that position consisted of snow plowing, cleaning ice rinks in the winter, maintaining the irrigation system for the City's parks, and operating heavy equipment. His supervisor was Gerald Ruppelius, the City's Public Works Supervisor. When Mr. Ruppelius was absent from work, Mr. Smith assumed supervisory duties as lead man. Mr. Smith continued to be paid on an hourly basis. (Testimony of Arnold Smith and Gerald Ruppelius)

3. In 1990 the City promoted Mr. Smith to the position of parks foreman/supervisor. In that capacity, his duties were primarily supervisory in nature. Mr. Smith assisted Mr. Ruppelius in making assignments to the parks work crews and kept Mr. Ruppelius informed about the activities of those work crews. The parks foreman/supervisor position was a salaried position not covered by a collective bargaining agreement. (Testimony of Messrs. Smith and Ruppelius; Exhibit 10)

4. All of the evaluations of Mr. Smith's performance that were made during his employment with the City indicated that his performance was above average and that he met or exceeded the requirements of the positions he occupied. (Exhibit O) There was no indication by the City that Mr. Smith has ever been considered

incompetent in the performance of his duties or that he had been guilty of any kind of misconduct.

5. In the summer of 1991, the City Administrator, Kurtis Ulrich, advised the Mayor and the City Council that due to revenue losses, resulting mainly from reduced building permit income and reductions by the legislature of aids to local governments, the City would experience a short fall of at least \$170,000 for 1991. The Mayor and the City Council charged Mr. Ulrich with the task of coming up with a plan to eliminate the shortfall. (Testimony of Kurtis Ulrich; Exhibit 1)

6. Mr. Ulrich discussed the problem with the City's department heads, and they developed a plan to address the shortfall. The plan had a number of different features and included eliminating a total of ten positions in city government. (Exhibit 2) It also included combining the City's Parks Department and Public Works Department and, after the two were combined, eliminating a layer of management -- specifically, two foreman supervisor positions. (Testimony of Messrs. Ulrich and Ruppelius; Exhibits 3 and E) One of those two positions, the parks foreman/supervisor position, was then held by Mr. Smith. The other, the street foreman/supervisor position, was held by Ernie Eden. Finally, the plan also called for eliminating a light equipment operator position held by Ross Anderson. (Testimony of Messrs. Ruppelius and Smith; Exhibit 6)

7. Mr. Eden was a nonveteran. When his street foreman/supervisor position was eliminated, his employment with the City was terminated. (Exhibit 6) When Mr. Anderson's light equipment operator position was eliminated, he was laid off but retained some recall rights under a collective bargaining agreement. (Exhibit 6) When Mr. Smith's parks foreman/supervisor position was eliminated, he was demoted to permanent lead man, a position he had formerly held with the City prior to 1990. (Testimony of Messrs. Ruppelius and Smith; Exhibits 7 and 10) Although the City intended these personnel actions to become effective in July of 1991 (Exhibit 6), Mr. Smith did not receive written notification of his demotion until January 24, 1992, and the reduction in his salary did not become effective until then. (Exhibits 7 and H)

8. At no time did the City provide Mr. Smith with written notification that he had a right under the Veterans Preference Act to request a hearing for the purpose of establishing either incompetence or misconduct as a basis for his demotion or that he had a right to petition the district court or the Commissioner of Veterans Affairs to determine whether his position of parks foreman/supervisor had been abolished in good faith.

9. After he was demoted to lead man, all of Mr. Smith's duties as parks foreman/supervisor were assumed by Mr. Ruppelius, who had been and continued to be Mr. Smith's immediate supervisor. Mr. Ruppelius was also a veteran, and who had been an employee of the City for over 20 years. None of Mr. Smith's duties as parks foreman supervisor were assigned to nonveteran employees with less seniority than Mr. Smith had. (Testimony of Gerald Ruppelius)

10. After his demotion, Mr. Smith performed the duties of a permanent lead man. As such, Mr. Smith was paid at an hourly rate and was again covered by a collective bargaining agreement. His duties involved working with crews, maintaining the parks irrigation system, plowing snow, operating equipment, etc. As lead man, Smith did act in a supervisory capacity in Mr. Ruppelius' absence. (Testimony of Messrs. Ruppelius and Smith)

11. The City continued to experience potential budget shortfalls after 1991. In 1993 the City reorganized its Economic Development Department, action that also involved the elimination of positions. (Testimony of Kurtis Ulrich; Exhibit 14)

12. On January 31, 1994, each of the City's department heads was directed to prepare and submit a "Personnel and Operations Report" for the purpose of analyzing operations and the use of personnel "in order to arrive at the most efficient and cost-effective manner (sic) and to provide services with a minimum of resources." (Exhibit 15, p. 2) Sometime in the spring of 1994 the City Council directed staff to prepare the 1995 budget for a zero percent expenditure increase. Since the City's budget had certain built-in financial tails, such as wage increases agreed to in collective bargaining agreements, each of the City's departments was required to make cuts in expenditures in order to comply with the City Council's request. (Testimony of Kurtis Ulrich; Exhibit 14)

13. Like other City departments, the Parks and Public Works Department was required to make some cuts in order to balance the City's 1995 budget. In May of 1994, that department submitted the required "Personnel and Operations Report." (Exhibit 15) Included in that report were two recommendations to the City Council regarding expenditure cuts in the Parks and Public Works Department budget for calendar year 1995.

14. The first proposed Parks and Public Works cut involved the elimination of on-call duties and pay. Employees of that department were being paid for being on-call outside of normal working hours during weekdays and on weekends on a rotating basis. The recommendation was for the Parks and Public Works Superintendent, a salaried supervisor, to assume on-call duties during the week for no increase in pay and also to implement a limited, rotating on-call schedule during weekends. (Testimony of Gerald Ruppelius; Exhibit 15, p. 25) It was estimated that this proposal would save approximately \$3,200 per year. (Exhibit 15, p. 25)

15. The second proposed Parks and Public Works cut involved the elimination of the permanent lead man position, which was then held by Mr. Smith. Mr. Smith's work duties would remain the same, but instead of being compensated for being a lead man all of the time, he would be compensated as a lead man only when he was actually performing lead man duties. The collective bargaining agreement covering Mr. Smith permitted this to be done. (Testimony of Messrs. Ulrich and Ruppelius; Exhibits 14, 15, and 16) It was estimated that this proposal would result in net savings of approximately \$3,000 to \$4,000 per year. (Exhibit 15, p. 25)

16. The proposed expenditure cuts described in Findings of Fact Nos. 14 and 15, above, were incorporated into the City's General Fund Operating Budget that was later approved by resolution of the City Council. (Testimony of Kurtis Ulrich)

17. Upon elimination of Mr. Smith's permanent lead man position, he was demoted to light equipment operator. Since then, he has occasionally performed lead man duties, but when he does so, he is paid a differential hourly rate in accordance with the pertinent collective bargaining agreement. (Testimony of Arnold Smith)

18. On or about October 3, 1994, Mr. Smith received a written memorandum from Bret Heitkamp, the City's Parks and Public Works Director, informing him that his position of permanent lead man would be eliminated as of January 1, 1995, and demoting him to light equipment operator. That memorandum did not include written notification of any rights Mr. Smith may have had under the Veterans Preference Act. (Exhibit L)

19. On or about October 28, 1995, Mr. Smith received a second written memorandum from Mr. Heitkamp. The second memorandum was identical to the memorandum described in Finding of Fact No. 16, above, with the following exceptions:

a. The memorandum bore the following additional title:

"NOTICE OF INTENT TO ELIMINATE PERMANENT LEAD MAN STATUS"

b. The memorandum contained the following additional paragraph:

Because of your veteran status, you are hereby informed that you have the right to request a hearing within sixty days of receiving this notice of intent to eliminate your permanent lead man status.

c. The memorandum contained the following handwritten notation from Mr. Heitkamp:

Arnie:

I need to Add the Paragraph Pertaining to you (sic) veteran status.

Thanks

Bret

* Have a Good Weekend!

d. The memorandum contained a further handwritten notation in someone else's handwriting that is not completely legible.

20. After receiving the October 28, 1995 memorandum from Mr. Heitkamp, Mr. Smith did not make a request within 60 days of the notice of intent to discharge for a

hearing on whether cause existed, as set forth in the Veterans Preference Act, to remove him from the position of permanent lead man and to demote him to the position of light equipment operator.

21. At no time did the City provide Mr. Smith with written notification that he had a right under the Veterans Preference Act to petition the district court or the Commissioner of Veterans Affairs to determine whether his position of permanent lead man had been abolished in good faith, nor did Mr. Smith ever make a request for such a hearing.

22. Any Finding more properly termed a Conclusion is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. § 14.50 and § 197.481 (1996), the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this proceeding under the Veterans Preference Act, Minn. Stat. § 197.46 (1996).

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The City received timely and proper notice of the hearing herein.

4. Mr. Smith is an honorably discharged "veteran" within the meaning of Minn. Stat. § 197.447 (1996) and § 197.46 (1996) and is entitled to all of the protections and benefits of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq. (1996).

5. The City is a political subdivision of the state within the meaning of Minn. Stat. § 197.46 (1996), and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, et seq. (1996).

6. The requirement of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 (1996) that a veteran is entitled to a hearing to establish incompetency or misconduct prior to termination of his or her employment normally does not apply when a public body eliminates a veteran's position in good faith for some legitimate purpose, such as when it is part of a good faith reduction in force. State, ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (Minn. 1923). However, when a public body does eliminate a veteran's position for reasons other than incompetency or misconduct, it is required to

provide the veteran with notice of the right to petition a district court or the Commissioner of Veterans Affairs for a hearing on whether good cause actually existed for elimination of the position. Young v. City of Duluth, 386 N.W.2d 732, 740 (Minn. 1986). This is also the case when a public body eliminates a position in good faith for some legitimate person and demotes the incumbent veteran to a lower paying position rather than discharging him or her. Leininger v. City of Bloomington, 299 N.W.2d 723 (Minn. 1980).

7. Whether a veteran's position has been eliminated in good faith for a legitimate purpose, resulting in that veteran's discharge or demotion, is an affirmative defense for which a veteran's public employer has the burden of proof. State, ex rel. Caffrey v. Metropolitan Airport Commission, 246 N.W.2d 637 (Minn. 1976); cf. Southern Minnesota Municipal Power Agency v. Schrader, 394 N.W.2d 796, 802 (Minn. 1986).

8. The City's decision in 1991 to eliminate a budget shortfall, in part, by implementing a reorganization plan for its Parks and Public Works Departments that included elimination of Mr. Smith's foreman/supervisor position and demoting him to lead man was made in good faith for a legitimate purpose.

9. Since the City eliminated Mr. Smith's foreman/supervisor position and demoted him to lead man in good faith and for a legitimate purpose, the City did not deny Mr. Smith rights provided to him by Minn. Stat. § 197.46 (1996).

10. Prior to eliminating his lead man position and demoting him to light equipment operator in 1994, the City afforded Mr. Smith some of the rights to which he was entitled under Minn. Stat. § 197.46 (1996) by providing him with written notice of his right to request a hearing on whether there was cause for his demotion. The City, however, failed to provide Mr. Smith with a required notice of his right to petition a district court or the Commissioner of Veterans Affairs for a hearing on whether good cause actually existed for elimination of the position. See Young, supra,

11. The City's decision in 1994 to produce a "zero expenditure" 1995 budget, in part, by implementing proposals to curtail on-call pay and to eliminate Mr. Smith's lead man position and demote him to light equipment operator was made in good faith for a legitimate purpose.

12. Since the City eliminated Mr. Smith's lead man position and demoted him to light equipment operator in good faith and for a legitimate purpose, the City did not deny Mr. Smith rights provided to him by Minn. Stat. § 197.46 (1996).

13. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

14. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge that the Petition of Arnold K. Smith be DISMISSED.

Dated this _____ day of September 1997.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (three tapes); No Transcript Prepared.

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NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

This proceeding was initiated by a Notice of and Order for Hearing dated April 6, 1995, issued by the Commissioner of Veterans Affairs pursuant to his authority under Minn. Stat. § 197.481 (1996). The Notice scheduled a hearing before an administrative law judge for the purpose of considering Mr. Smith's petition for relief under the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, et seq. Specifically, Mr. Smith alleged that the City demoted him on two separate occasions without first notifying him of his right to request certain hearings to which he might be entitled under the Veterans Preference Act. There was very little conflict in the evidence presented by both the parties and relatively little dispute about the underlying facts. The issues in this case relate primarily to the sufficiency of the evidence and to application of the law to the facts.

Minn. Stat. § 197.46 (1996) provides in pertinent part:

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. [Emphasis supplied.]

It is important at the outset to understand the purpose and the limits of this proceeding. The first issue before the Administrative Law Judge is whether, on either or both of two separate occasions, the City was obliged to give Mr. Smith notice of his right to request the hearing specified by Minn. Stat. § 197.46 (1996) — a hearing at which the City would be required to show incompetency or misconduct on Mr. Smith's part before demoting him. If the City was obliged to provide notice of those rights to hearings, then the second issue is whether it actually provided Mr. Smith with the required notices. If it should be found that on either occasion, the City failed to give the notice specified by statute, then Mr. Smith is entitled to request that the City provide him with a hearing on whether there was just cause for either demotion. Any such hearings, however, can only be conducted later and in a separate forum.^[1]

The parties both agree that Mr. Smith is an honorably discharged veteran who is entitled in appropriate circumstances to receive notice of an intent by the City to discharge him from his employment so that he has an opportunity to request the hearing on cause specified by Minn. Stat. § 197.46 (1996). For purposes of the notice required by the Veterans Preference Act, the term "discharge" is considered to embrace a

demotion. Leininger v. City of Bloomington, *supra*. On its face, Minn. Stat. § 197.46, *supra*, appears to require a public body to give notice of its intent to terminate the public employment of an honorably discharged veteran or to demote him or her, regardless of whether or not the personnel action is part of a *bona fide* reduction in force. However, beginning with State, ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (Minn. 1923), the Minnesota Supreme Court has established a line of authority indicating that the Veterans Preference Act does not prevent public employers from eliminating *positions*, and incidentally the employment of veterans who may occupy them, so long as those positions are being eliminated in good faith for legitimate purposes:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. [Citations omitted.] The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act. *Id.* at 32.^[2]

An assertion by a public body that a veteran's position has been eliminated as the result of a good faith reduction in force is an affirmative defense for which the public body has the burden of proof. See, e.g., State, ex rel. Caffrey v. Metropolitan Airport Commission, 246 N.W.2d 637 (Minn. 1976); cf. Southern Minnesota Municipal Power Agency v. Schrader, 394 N.W.2d 796, 802 (Minn. 1986). The same affirmative defense would also be available for a demotion where the reason for the demotion was elimination of the veteran's previous position.^[3]

In Young v. City of Duluth, *supra*, the Minnesota Supreme Court held that where a public body relies on good faith elimination of a veteran's position as the reason for failing to give a veteran notice of a right to a hearing to establish incompetency or misconduct, that public body still must give the veteran notice of the right to petition a district court or the Commissioner of Veterans Affairs for a hearing on whether good cause actually existed for elimination of the position. 386 N.W.2d at 738 n. 1. So, although this tribunal cannot consider the merits of any claim of incompetency or misconduct, it can consider the merits of the City's claim that the two positions from which Mr. Smith was demoted were eliminated in good faith and for legitimate reasons.

In determining whether a position has been eliminated in good faith, a reviewing tribunal is obliged to examine the substance of the action and not just the form. Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). Whether action to eliminate the

position has been taken in good faith or whether the reasons given by the public body are merely a subterfuge to oust the veteran from his position is a question of fact to be determined by the trier of fact by a preponderance of the evidence. Caffrey, supra, 246 N.W.2d at 641; State, ex rel. Niemi v. Thomas, 27 N.W.2d 155, 157, 223 Minn. 435, 438 (Minn. 1947).

Mr. Smith's First Demotion

As previously noted, the parties agree that Mr. Smith is an honorably discharged veteran. They also agree that when the City abolished his parks foreman/supervisor position as of January 27, 1992, and transferred him to a lead man position, those actions amounted to a demotion. There is further no dispute that for purposes of Minn. Stat. § 197.46 (1996), a demotion is tantamount to a dismissal and triggers the notification provision of that statute. Finally, the parties agree that the City did not inform Mr. Smith pursuant to Minn. Stat. § 197.46 (1996) that he had a right to a hearing at which the City was required to show incompetency or misconduct on his part prior to eliminating his foreman/supervisor position and demoting him to lead man. In short, Mr. Smith established a prima facie case that the City violated rights afforded him under the Minnesota Veteran's Preference Act.

The City, however, has raised as an affirmative defense the fact that it eliminated Mr. Smith's parks foreman/supervisor position and demoted him to lead man as part of a good-faith, city wide reduction in force. The City therefore argues that under existing law, it was not required to notify him of, or provide him with, a hearing at which it was required to show incompetency or misconduct on his part. As noted above, Minnesota's appellate courts have consistently held that good faith elimination of a position is an established defense for public bodies which have not provided veterans with the hearing notification specified by the Veterans Preference Act.^[4] The City concedes that it did not give Mr. Smith notice of his right to have the issue of good faith determined in a district court or in an administrative proceeding initiated by the Commissioner of Veterans Affairs. Mr. Smith has, therefore, never waived that right, and the issue of whether Mr. Smith's first demotion was done in good faith and for a legitimate governmental purpose is properly before this tribunal.

The evidence presented by the City established the following: The City's fiscal year is coterminous with the calendar year. During 1991 the City experienced revenue losses, primarily the result of reductions in building permit income and legislative reductions in aids to local government. Estimates made on June 14, 1991, indicated that there would be a shortfall in the City's budget of about \$170,000 by the end of the year. Mr. Ulrich, the City Administrator, was charged by the Mayor and the City Council with coming up with a plan to eliminate the shortfall. (Testimony of Kurtis Ulrich; Exhibit 1) After discussions with the City's department heads, a plan to address the shortfall was developed. That plan involved eliminating ten positions within city government (Exhibit 2), as well as combining the City's Parks Department with the Public Works Department. After combining the two departments, the plan called for eliminating a

layer of management — specifically two foreman/supervisor positions, one of which was occupied by Mr. Smith. (Testimony of Kurtis Ulrich; Exhibits 3 and E) The portions of the plan relating to changes in the Parks and Public Works Departments were based on thorough surveys of the activities of those departments and the personnel assigned to them. (Exhibit 11) The City Council discussed and adopted the plan. (Testimony of Kurtis Ulrich, Exhibits 4, 8, and 9) As part of the plan, Mr. Smith's position of parks foreman/supervisor was eliminated, and he was demoted to the position of permanent lead man, a position he had held prior to 1990. When Mr. Smith's foreman/supervisor position was eliminated, all of the duties associated with that position were assumed by Gerald Ruppelius, who was Mr. Smith's immediate supervisor and also a veteran. None of Mr. Smith's duties as a foreman/supervisor were reassigned to nonveteran employees with less seniority than he had. (Testimony of Gerald Ruppelius) The position of street foreman/supervisor was also eliminated, and that incumbent's employment was terminated. Another employee in that department was also laid off as part of the overall plan. (Testimony of Gerald Ruppelius; Exhibit 6). Mr. Smith did not receive written notice of his demotion until January 27, 1992, and that notice did not contain notification of his right under Minn. Stat. § 197.46 (1996) to request any hearing under the Veterans Preference Act. (Testimony of Arnold Smith; Exhibits 7 and H). In short, the City came forth with persuasive evidence that Mr. Smith's park foreman/supervisor position was eliminated and that Mr. Smith was demoted to lead man as part of a good faith, city-wide plan of administrative reorganization and reduction in force. Mr. Smith, on the other hand, came forward with no evidence whatever from which a finding could be made, or even an inference drawn, that the City demoted him in bad faith. Since the City's evidence of good faith was uncontroverted, it has established its "good faith" defense with respect to the first demotion.

Mr. Smith's Second Demotion

The City does not dispute that it demoted Mr. Smith again on January 1, 1995. In connection with that demotion, however, it did provide him with some notice of rights under the Veterans Preference Act. On October 28, 1994, Mr. Smith received a memorandum from Bret Heitkamp, the City's Parks and Public Works Director, which contained the following provision:

Because of your veteran status, you are hereby informed that you have the right to request a hearing within sixty days of receiving this notice of intent to eliminate your lead man position. (Exhibit M)

In short, the evidence established that with respect to that second demotion, the City provided Mr. Smith with the notice that Minn. Stat. § 197.46 (1996) required the City to give. There is no evidence in the record that Mr. Smith requested a hearing within sixty days following receipt of this notice. Accordingly, Minn. Stat. § 197.46 (1996) explicitly sets forth the legal consequences that arise from these undisputed facts:

The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

Here, the City gave Mr. Smith notice of his right to a hearing to establish incompetency or misconduct prior to eliminating his lead man position and demoting him. By failing to request a hearing on whether there was cause for removing him his position and demoting after being notified of his right to do so, Mr. Smith waived his right to that particular relief.

However, the City has never claimed that Mr. Smith was incompetent or guilty of misconduct. It claims that it eliminated his permanent lead man position and demoted him to light equipment operator in good faith as part of budget measures that were required in order to comply with the legitimate fiscal policies of the City Council. Young, supra, established that Mr. Smith is entitled to notice of his right to petition a district court or the Commissioner of Veterans Affairs for a hearing on whether good cause actually existed for elimination of the position. The notice that the City provided Mr. Smith on October 28, 1994, was ineffective for this second purpose, so the issue of whether the second demotion resulted from a good faith elimination of his permanent lead man position is properly before the Administrative Law Judge.

The evidence presented by the City, with respect to the second demotion, established the following: In early 1994, the City's department heads were again directed to analyze operations of their departments and the use of personnel in order to promote maximum efficiency and cost-effectiveness. (Exhibit 15, p. 2) Sometime thereafter, the City Council directed staff to prepare the 1995 budget for a zero percent expenditure increase. Since the City's budget had certain built-in financial tails, such as wage increases agreed to in collective bargaining agreements, it was necessary for departments to make cuts in expenditures in order to comply with the City Council's request. (Testimony of Kurtis Ulrich; Exhibit 14) Mr. Heitkamp, the Parks and Public Works Director, used the personnel and operations report, which had been requested of department heads earlier in the year, as a vehicle for determining where budget cuts in his department should be made. He came up with two proposed cuts: curtailing on-call duties and pay and eliminating the department's lead man position. The latter proposal resulted in Mr. Smith's demotion to light equipment operator. The former yielded \$3,200 in savings; the latter \$3,000 to \$4,000. (Testimony of Gerald Ruppelius; Exhibit 15, p. 25) The collective bargaining agreement with the union representing Mr. Smith permitted the City to pay employees a differential for any time they actually worked as lead men, rather than requiring that lead men be assigned a separate and permanent job classification. (Exhibit 19C, Article XVI) The proposed cuts were incorporated into the City's 1995 budget and approved by the City Council. As was the case with the facts surrounding the first demotion, Mr. Smith introduced no evidence tending even to suggest that the City's actions were not taken in good faith. The City therefore met its burden of proving good faith in connection with Mr. Smith's second demotion.

B.H.J.

^[1] In his post-hearing brief, Mr. Smith suggests that the merits of his demotion — i.e., whether the City can establish misconduct or incompetency on Mr. Smith's part — are at issue in this proceeding. As noted above, that is not the case. The only two matters at issue here are whether the City was required to give Mr. Smith *notice of his right* to a hearing on the merits of each of his demotions and, if so, whether that notice was given in each case.

^[2] See also, Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986).

^[3] In his post-hearing brief, Mr. Smith argues that Leininger v. City of Bloomington, supra, stands for the proposition that a veteran cannot be demoted except for incompetency or misconduct, thereby suggesting that a good faith reduction in force is no defense in a demotion case. First, in Leininger there was no claim that the veteran's demotion was the result of a good faith reduction in force, so that issue was not before the court. Second, good faith elimination of a position is a defense to failure to provide notification in a discharge case. See Boyd, Caffrey, etc., supra. When the cause of a demotion is good faith elimination of a veteran's previous position, the affirmative defense of good faith that is applicable to discharge cases is also available in a demotion case. Where, as in Leininger, demotion is not the result of elimination of the veteran's previous position, a good faith defense to failure to give notice is unavailable.

^[4] See State, ex rel. Boyd v. Matson and the other cases cited, supra, at pp. 11-12.